The Law Commission

Working Paper No 60

Firm Offers

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It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 1 December 1975.

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HER MAJESTY'S STATIONERY OFFICE
1975

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THE LAW COMMISSION

WORKING PAPER No. 60

First Programme, Item I

LAW OF CONTRACT

FIRM OFFERS

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FIRM OFFERS

PART I - INTRODUCTION

1. In our First Programme[1] we recommended that the law of contract be examined with a view to codification, and in our First Annual Report, 1965-1966[2], we stated that our intention was not merely to reproduce the existing law but to reform as well.

2. After much work had been done towards the preparation of a draft contract code, we came to the conclusion that the publication of such a code, however fully annotated, would not be the best way of directing public attention to particular aspects of the law of contract which might be in need of amendment or of promoting examination and discussion of those aspects in depth[3]. Work on the production of a contract code has, therefore, been suspended and we now intend to publish a series of working papers on particular aspects of the English law of contract with a view to determining whether, and if so what, amendments of general principle are required. This will be in line with our method of dealing with most subjects and has the advantage of concentrating public discussion on particular problems.

3. This is one of several working papers which we expect to publish to initiate consideration of a number of aspects of the general principles of the law of contract. Most text-books on the English law of contract start with an examination of 'offer', 'revocation of offer' and 'acceptance', and an exposition of the rule that an offeror can revoke his offer at

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1. Law Com. No. 1 (1965), Item I.
2. Law Com. No. 4 (1966), para. 31.
3. Eighth Annual Report, 1972-1973, Law Com. No. 58, paras. 3-5.

any time prior to its acceptance by the offeree, without incurring liability. In the case of the ordinary offer no major changes in the rule or in the general law of 'offer' 'revocation of offer' and 'acceptance' seem to be required and we shall not be issuing any other working papers on these topics. The purpose of the present paper, however, is to consider whether offers which we shall describe as 'firm offers' should be treated differently from other offers.

4. It is not uncommon for a business man, when quoting a price for the sale and supply of materials or for the performance of services, to state that the terms of his quotation are to be valid for a specified period, for example "Good for two weeks". In the commercial context this usually means that the offeror is thereby promising that he will not revoke the offer contained in the quotation during the specified period nor seek to vary its terms. An offer that is backed by a gratuitous promise of non-revocation is sometimes described as a 'firm offer' and we shall use the expression in this working paper as having such a meaning.

5. Firm offers have no special place in the English law of contract and a promise not to revoke an offer is, by itself, legally worthless. This is because it is not supported by consideration[4]. We are of course studying the doctrine of consideration as a whole, and shall in due course be issuing a series of working papers on that topic. The present paper, however, is written on the assumption that as far as firm offers are concerned consideration, or something like it, will continue to be necessary to support the promise of irrevocability, except where our present provisional proposals provide otherwise.

6. The unenforceability of firm offers can lead to strange and apparently unjust results, as may be illustrated by the

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4. See below, paras. 15-18.

following sequence of events:

> A wishes to have some building work done and invites builders to submit tenders. The job includes electrical work as well as construction work. B, who is a building contractor, wishes to tender for the job but as he does not employ electricians himself he asks an electrical contractor, C, to quote him a price for doing the electrical work under a sub-contract. C gives a quotation at a moderate price which is expressed to be "Good for two weeks" and B relies on this figure when stipulating the price for which he can do the job for A. Within the two weeks A accepts B's tender for the whole job but, before B has informed C that he is accepting his quotation for the electrical work, C revokes and says that he will want to be paid more than he had previously stated. B is thus caught: he is bound by contract to do the whole job for A at the agreed price but C is not bound by contract to him and on the present state of the law B has no right of redress against C for any loss that C's revocation of his firm offer may cause him, although the revocation was within the two week period.

7. "The law", said Mellish L.J. in 1876[5], "may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by that promise to give that time", but neither he nor the other members of the Court of Appeal who gave judgments in that case doubted that the law on the point was established and clear. The general revocability of firm offers has been accepted by the courts ever since[6]. Nearly one hundred years have passed since

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5. In Dickinson v. Dodds (1876) 2 Ch.D. 463, 474.

6. Examples are to be found in Stevenson v. McLean (1880) 5 Q.B.D. 346 and in Bristol A.B. Co. Ltd. v. Maggs (1890) 44 Ch.D. 616.

Mellish L.J. adverted to the possibility that the law on firm offers might be "wrong". In this working paper we shall consider whether, in the interests of justice, it ought now to be changed.

PART II - THE PRESENT LAW

8. Offers cannot be accepted after they have been revoked[7] or rejected[8] nor, if a time limit is fixed for acceptance, can they be accepted after the expiry of that time. There are other situations in which an offer may cease to be capable of acceptance[9] but we do not propose to examine them in this working paper. We are less concerned here with the circumstances in which an offer may come to an end than with the basic rule that a firm offer is no less revocable than an ordinary offer.

9. Before considering the exceptions to the basic rule, there are two points which we should get out of the way as they may otherwise cause confusion later. The first is that not every intimation that an offer is 'good' for a specified period imports a promise that the offer will not be revoked within that period. It may mean no more than that the offer will lapse at the end of the period if not revoked before[10]. The question is one of interpretation and the answer will depend on the particular facts and circumstances of the individual case, but in this paper we are only concerned with offers which place a limit upon the offeror's right of revocation

10. The second point is that persons sometimes make agreements or promises that are not intended to be legally binding

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7. Dickinson v. Dodds (1876) 2 Ch.D. 463, 474.
8. Hyde v. Wrench (1840) 3 Beav. 334.
9. For example, on the death of the offeror or the passing of a 'reasonable time'.
10. Offord v. Davies (1862) 12 C.B.(N.S.) 748.

and the law will not generally impose obligations in contract that the parties did not intend to assume. The most obvious example is the agreement that is made "subject to contract", and which is prevented by the inclusion of this stipulation from being legally binding in the meantime[11]. Another example is the 'gentleman's agreement' which the parties intend to be binding in honour but not in law; such an arrangement does not constitute a legal contract. Other examples were given by Atkin L.J. in Balfour v. Balfour[12] as "where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife." Promises of non-revocation that are made where no legal relations are intended fall outside the ambit of this paper. So too do promises to keep open offers that would not become binding if accepted, such as offers made "subject to contract".

11. Having narrowed our definition of 'firm offers' slightly to take these points into account we now turn to the exceptions to the general rule of revocability of offers.

12. The first exception is obvious: it is that like any other offer a firm offer cannot be revoked once it has been accepted[13]. In the ordinary way a letter of acceptance will be effective from the moment that it is posted and a letter of revocation from the moment that it is received. Thus the main contractor, B, in the facts given in paragraph 6 can often, but not always, protect himself by posting a letter of acceptance to his sub-contractor as soon as he learns that his tender for the main contract has been accepted.

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11. Chillingworth v. Esche [1924] 1 Ch. 97.
12. [1919] 2 K.B. 571, 578.
13. Byrne v. Van Tienhoven (1880) 5 C.P.D. 344.

13. The second exception is that a promise to keep an offer open will be binding on the offeror if made in a deed under seal or if consideration for the promise is given by the offeree.

14. Deeds. A deed is rarely employed in the sort of situation that we are considering in this working paper but if the offeror were to bind himself by a promise under seal to keep an offer open for a particular period he would be bound by it. A promise under seal is a 'specialty' and is binding although no consideration has been given by the promisee. In another paper we shall examine the place of the 'specialty' in the present law and consider whether reforms are needed. In the present working paper however we are only concerned with firm offers that are not made binding by being made under seal.

15. Consideration given by the offeree. If an offeror promises that he will not revoke his offer for a certain period of time and the offeree gives consideration for the promise of non-revocation, that promise will be contractually binding on the offeror. This result is usually achieved by the granting of an option in return for a cash payment but the principle is wide enough to include the giving of consideration in other forms.

16. To return to the facts of the problem set out in paragraph 6, if B had given consideration for C's promise C would have been bound by it. If, for example, C's offer had included a term that B would nominate him for the sub-contract work and B had done so in his tender then B would have given consideration for the promise of non-revocation and C would have been liable. However B's acting to his detriment in reliance on C's promise does not on the present state of the law[14] amount, by itself, to consideration, so he has no remedy in contract solely on the ground that he so acted, and even if he could prove a want

14. Combe v. Combe [1951] 2 K.B. 215, but see paras. 51-54 below

of care on C's part he would probably have no remedy in tort either[15].

17. The firm offer supported by consideration is most frequently encountered in commerce in the form of an option to purchase or sell on specified terms. The person to whom the option is granted has an enforceable right to exercise the option according to its terms although the person who granted it may have purported to revoke it. If therefore the offeror grants the offeree the option of purchasing his house for £10,000 at any time in the 12 months following the grant, and the offeree pays him a cash consideration for the grant, the offeror cannot escape the legal consequences of what he has done by revoking the option. If he attempts to do so the offeree may exercise the option notwithstanding and obtain damages or, in an appropriate case, specific performance of the transaction to which the option relates[16].

18. To summarise, a promise to keep an offer open for a specified time may be broken and the firm offer revoked without liability on the offeror, except where the offeree has accepted the offer before revocation or where the promise is made under seal or the offeree has given consideration for it. In the remainder of this working paper we shall be concerned with the situations in which the rule applies rather than with the exceptions to it. In Part III of the paper we shall consider criticisms that have been made of the rule and in Part IV we shall examine the ways in which it might be altered. Our own provisional recommendations for its reform are set out in Part V.

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15. In Holman Construction Ltd. v. Delta Timber Co. Ltd. [1972] N.Z.L.R. 1081, the plaintiff contractor framed his case against the sub-contractor in the tort of negligence but it was held that the sub-contractor owed him no duty of care so the claim was dismissed.

16. Mountford v. Scott [1973] 3 W.L.R. 884 (Ch.D.), affirmed [1975] 2 W.L.R. 114 (C.A.).

PART III - CRITICISMS OF THE PRESENT LAW

19. The revocability of firm offers was considered by the Law Revision Committee when examining the doctrine of consideration, in their Sixth Interim Report[17], published in 1937. They gave their reasons for concluding that firm offers ought not to be freely revocable and made proposals for a change in the law. The relevant paragraphs are reproduced in full in the Appendix to this working paper but we propose to examine here the three major criticisms that the Committee made of the existing law.

(a) The rule is "contrary to business practice".

20. We think that modern business practices in relation to firm offers should be examined. The revocability of firm offers is a consequence of the doctrine of consideration and the presence or absence of consideration in connection with firm promises may not be regarded by businessmen as commercially significant. Judicial notice was taken recently of the reluctance of insurers to take 'consideration' points[18] and it may be a fair criticism of this part of the law that it allows a lower standard of commercial behaviour than that to which reputable businessmen generally conform. On the other hand when some research was done into business practices in the construction industry in the United States of America in 1951 the results[19] did not show that persons in the position of B, the main contractor, in the problem posed in paragraph 6, were either surprised or aggrieved by the law that made firm offers revocable. We should welcome the views of those engaged in commerce on their practice and whether they regard the present law as satisfactory.

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17. Cmd. 5449.

18. Jaglom v. Excess Insurance Co. Ltd. [1972] 2 Q.B. 250, 257-258, per Donaldson J.

19. Franklin M. Schultz, "The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry", (1952) 19 University of Chicago Law Review 237.

(b) "If the offeror wants a consideration for keeping [the offer] open, he can stipulate for it and his offer is then usually called 'an option'. Merely because he does not so stipulate, he ought not to be allowed to revoke his offer with impunity."

21. To return to the facts posed in paragraph 6, B, the building contractor, asks C, the electrical contractor, to quote him a price. C is not obliged to give a quotation at all and if he gives one he is not ordinarily bound to hold it open for acceptance for a particular time. It may be important to B that C's quotation should not be revocable for a particular period and, if C were to stipulate for the payment of money in return for his promise to keep the offer open, B might be willing to pay it and thus to make the promise binding. The point made by the Law Revision Committee is that an offeror can put a price on his promise of non-revocation if he chooses and should be no less bound because he chooses to make the promise gratuitously. Our provisional view is that this argument has validity so long as the offeror and the offeree are bargaining from positions of equality. There are however many situations in which the offer consists of a printed document in standard form, prepared by the offeree, which the offeror is invited to sign. With hire purchase transactions and mail order business, for example, the offer is usually made by the customer in terms that have been formulated in writing by the offeree and the acceptance of the offer may not take place for several days. The common law rule that an offeror may revoke his offer at any time prior to acceptance operates for the protection of the public in that it enables the customer who acts speedily to save himself from a disadvantageous bargain[20], and it has been supplemented by a number of statutory provisions that give the consumer ' cancellation' rights and a 'cooling off' period in certain circumstances If however firm offers were to be made binding in all circumstances a customer could be deprived of his common law right of

20. See Financings Ltd. v. Stimson [1962] 1 W.L.R. 1184.

21. See Hire-Purchase Act 1965, ss. 11-15, and Consumer Credit Act 1974, ss. 67-73, not yet in force.

revocation by the inclusion of an 'irrevocability' clause in the offeree's standard form of 'offer'. A case can be made for allowing the customer in this type of situation to revoke a firm offer "with impunity".

(c) "According to the law of most foreign countries a promisor is bound by such a promise. It is particularly undesirable that on such a point the English law should accept a lower moral standard."

22. In 1937, when the Law Revision Committee's Report was published, the countries whose legal institutions were founded on Roman Law had laws that made firm offers enforceable, whereas countries with a common law history did not. In Paterson v. Highland Railway Co.[22] Lord Dunedin pointed out the difference between Scots and English law in the following words:

> "If I offer my property to a certain person at a certain price and go on to say 'This offer is to be open up to a certain date' I cannot withdraw that offer before that date, if the person to whom I made the offer chooses to accept it. It would be different in England, for in the case supposed there would be no consideration for the promise to keep the offer open."

23. The laws of France, Germany, Italy and other Roman Law countries followed the same pattern as Scots law on this point and still do, whereas in common law jurisdictions in Canada and the United States of America the law in 1937 was the same as in England. The facts of the problem outlined in paragraph 6 were substantially those in the American case of James Baird Co. v. Gimbel Bros. Inc.[23] and the claim by the main contractor to enforce the firm offer was dismissed by Judge Learned Hand. The acceptance was too late, according to Judge Hand, "... since the offer was withdrawn before it was accepted".

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22. 1927 S.C. (H.L.) 32, 38.

23. (1933) 64 F. 344.

24. Since 1937 there have been developments in the laws of most States in America that have made firm offers binding in situations in which they would not be binding on the present state of English law. In many States "injurious reliance" is now accepted by the courts as making firm offers binding although no consideration has been given by the offeree. We shall return to this theory in Part IV of this paper[24], but the gist of it is that where an offeree has acted to his detriment in reliance on the offeror's promise, express or implied, to hold his offer open for a specified time or for a reasonable time, the promise may become binding. There are at least two reported cases[25] in which a sub-contractor has been held liable in damages to a main contractor for purporting to revoke an estimate on which the main contractor had relied in tendering for the main contract.

25. Another significant development in the United States of America has been the adoption, by all the States except Louisiana[26], of the Uniform Commercial Code. Section 2-205 provides:

> "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror."

26. The New York General Obligations Law, Article 5-1109, as amended in 1964, is wider in scope than Section 2-205 of the Uniform Commercial Code, in that it is not limited to offers

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24. In paras. 51-54 below.

25. Northwestern Engineering Co. v. Ellerman (1943) 10 N.W. 2d 879 (S. Dak.) and Drennan v. Star Paving Co. (1958) 333 P. 2d 757 (Cal.)

26. This State follows French law and recognises the irrevocability of firm offers anyway: Harris v. Lillis (1946) 24 So. 2d 689.

by merchants, nor is it confined to sale or purchase of goods, nor does it have a three-month time limit. It provides:

> "Written irrevocable offer. Except as otherwise provided in section 2-205 of the uniform commercial code with respect to an offer by a merchant to buy or sell goods, when an offer to enter into a contract is made in writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such a period set forth or until such time because of the absence of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time."

27. There have been other developments since 1937 on this side of the Atlantic too, culminating in the passing into law of the Uniform Laws on International Sales Act 1967. By virtue of this Act and the Uniform Law on International Sales Order 1972[27], the provisions of the Convention on a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) may apply to international sales proposed between persons in the United Kingdom and persons in Belgium, Israel, the Netherlands, San Marino or Italy. Article 5 of ULFIS provides as follows:

> 5.2 After an offer has been communicated to the offeree it can be revoked unless the revocation is not made in good faith or in conformity with fair dealing or unless the offer states a fixed time for acceptance or otherwise indicates that it is firm and irrevocable.

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27. S.I. 1972, No. 973.

5.3 An indication that the offer is firm or irrevocable may be express or implied from the circumstances, the preliminary negotiations, any practice which the parties have established between themselves or usage.

(d) Summary

28. The trend since 1937, both nationally and internationally, seems therefore to favour a modification of the rule to which Mellish L.J. referred in 1876[28] and to make firm offers binding in some circumstances in which they were not binding thirty years ago. It is for consideration whether the criticisms of the common law rule have sufficient merit to justify a change in the law and we would welcome comments and opinions on this point. In the remainder of this working paper it will be assumed that there are some circumstances at least in which firm offers which are not binding under the present law should be made binding upon the persons making them.

PART IV - POSSIBLE CHANGES IN THE LAW

29. The Law Revision Committee regarded the firm offer problem as one of the unsatisfactory consequences of the doctrine of consideration, so their proposal[29] was to give the offeree substantially the same rights against the offeror in respect of a firm offer as if it had been supported by consideration. This is certainly one way of altering the law on this point, but there are other ways that ought also to be considered. On the assumption that firm offers ought, as a matter or justice, to be binding upon some persons in some circumstances, the

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28. See para. 7 above.

29. The text of the proposal is set out in the Appendix to this paper.

following questions must be considered:

(a) Who should be bound?

(b) For what period?

(c) Should writing be a condition of enforceability?

(d) What classes of transaction should be affected?

(e) What remedies should be available?

(a) Who should be bound?

30. In the United States the Uniform Commercial Code provides that firm offers should be enforceable against merchants only, whereas both the law of New York and the change in the English law proposed by the Law Revision Committee are of general application. We have already pointed out[30] that if every firm offer were to be binding the consumer might be worse off in his dealings with commercial organisations than he is at present. The trend in recent legislation[31] has been to add to the rights that the consumer has at common law, not to take them away, and the social considerations that have resulted in this trend are relevant to the present subject.

31. A person who sells goods in the course of a business assumes a greater legal responsibility for the quality and fitness of the goods than a person who sells goods privately[32] and the Sale of Goods Act 1893 provides[33] that a sale is 'in the course of a business' not only when it is made by a principal in the course of a business but also, in many cases, when it is made by an agent who is acting in the course of a business. A similar distinction could be made between firm

30. In para. 21 above.

31. Such as the Supply of Goods (Implied Terms) Act 1973 and the Consumer Credit Act 1974.

32. This was so under section 14 of the Sale of Goods Act 1893, even before it was amended.

33. Sale of Goods Act 1893, s. 14(5), as amended by Supply of Goods (Implied Terms) Act 1973, s. 3.

offers made in the course of a business and firm offers that are not so made. Our provisional view is that a firm offer should be binding when made 'in the course of a business', whoever the offeree may be, but that it should not be binding otherwise. We should welcome views on the situation where neither offeror nor offeree is acting in the course of a business.

(b) For what period?

32. Clearly the promise of non-revocation should not bind the offeror for longer than the period specified in the promise, but should it bind him for less? The present law is that an offer cannot be accepted once it has been rejected[34] and our provisional view is that this rule should continue to apply to firm offers whatever other changes in the law may be made. There may of course be other situations in which the offeror would be justified in regarding himself as no longer bound by a firm offer, for instance where the firm offer was induced by the offeree's fraud, but these are already provided for in the general law. If a firm offer would not be binding even if paid for, clearly it ought not to be binding if made gratuitously. Section 2-205 of the Uniform Commercial Code[35] provides for an outside limit of three months, so that an offeror who promises to keep an offer open for, say, four months is bound by his promise for three months but free to revoke it during the fourth. This could constitute a trap for the unwary offeree. On the other hand it would be inconvenient for offerors, and their executors, to be bound for very long periods of time: an option to purchase an interest in land must usually be exercisable within a twenty-one year period, or it will be void for 'perpetuity'[36]. The limitation period for bringing an action founded on simple contract is six years[37], and our provisional view is that a promise of non-revocation that was

34. Hyde v. Wrench (1840) 3 Beav. 334.
35. See para. 25 above.
36. Perpetuities and Accumulations Act 1964, s. 9(2).
37. Limitation Act 1939, s. 2(1)(a).

expressed to run for a longer period should cease to be binding after six years.

33. The unspecified period. Section 2-205 of the Uniform Commercial Code[38] and section 5-1109 of the New York General Obligations Law[39] each provide that an irrevocable offer should be kept open for a reasonable time if no definite period is specified, and Article 5(2) of ULFIS[40] provides that an offer which does not state a fixed time for acceptance and does not otherwise indicate that it is firm and irrevocable may be revoked "unless the revocation is not made in good faith or in conformity with fair dealing". On the other hand the opinion of the Law Revision Committee on this point was as follows:

> "We consider that the fixing of a definite period should be regarded as evidence of his [the offeror's] intention to make a binding promise to keep his offer open, and that his promise should be enforceable. If no period of time is fixed, we think it may be assumed that no contractual obligation was intended".

34. The point could arise if a businessman were to make an offer to another businessman and were to promise that he would keep the offer open until the other had had time to discuss it with his business partners. If the promise were intended to be legally binding, should the offeror be allowed to revoke it the very next day, or should he be bound to keep the offer open for a reasonable time? It might seem undesirable that his promise should have no effect at all, but to oblige him to allow a 'reasonable time' would introduce an element of uncertainty and would lead to disputes over what

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38. See para. 25 above.
39. See para. 26 above.
40. See para. 27 above.

would in the given case be a reasonable time.[41] The offeree generally has the chance of removing the uncertainty by asking for a definite period of time to be fixed. Perhaps it should be up to him to have the period defined if he wants the promise to be legally binding on the offeror? The problem is nicely balanced and it is one on which we would welcome opinions. Our provisional view is that the need for certainty outweighs the other considerations and tips the balance in favour of the Law Revision Committee's conclusion. We therefore make the provisional recommendation that a firm offer should only be binding if it is supported by a promise that the offer will not be revoked for a definite period. We have considered whether to go further and recommend that it should only be binding where the promise of non-revocation is made expressly[42], but the distinction between express and implied promises can give rise to difficulties. The making of the promise may be clear from the course of dealings between the parties but it may be less clear whether it should be classified as an express promise or an implied one. Our provisional view is that if an implied promise of non-revocation for a definite period were excluded from our proposals it would cause more difficulties than it prevented.

(c) Should writing be a condition of enforceability?

35. The first question is whether a promise to keep an offer open for a definite time should only be enforceable if evidenced in writing. In a commercial context importance may be attached to writing as evidence not only of the promise but also of the writer's willingness to commit himself to something that is legally binding. As between businessmen a promise that the offeror is not prepared to confirm in writing may well be regarded by both parties as legally valueless. It may be that considerations of this kind led to 'writing' being

41. For an analysis of the 'reasonable time' problem in a slightly different context see the judgment of Buckley J. in Manchester Diocesan Council for Education v. Commercial & General Investments Ltd. [1970] 1 W.L.R. 241, 247-249.

42. See the proposal of the Law Revision Committee in the Appendix.

made a condition of enforceability by Section 2-205 of the Uniform Commercial Code[43] and section 5-1109 of the New York General Obligations Law[44]. On the other hand to make writing a legal requirement could lead to injustice, particularly when the offeree is not a businessman but an ordinary member of the public. He may be given an oral assurance over the telephone or in a shop that an offer will be kept open for him for a certain time, and he may not like to ask that this be confirmed in writing. In court proceedings he would have the burden of proving that the promise really had been made but if he were to discharge this it would seem unfair that his claim should fail for absence of writing. Our provisional conclusion is that a requirement of writing would probably cause more injustice than it prevented.

36. There is a subsidiary problem. What if the alleged contract formed by acceptance of the offer is only enforceable if evidenced by writing? The clearest example is in the offer to sell land or an interest in land which cannot ordinarily be enforced on acceptance by the offeree unless there is a written memorandum of the terms of the agreement which bears the offeror's signature.[45]

37. The following supposed facts may illustrate the problem:

> X, a property developer, makes a written offer to Y to sell him certain land for £10,000.

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43. See para. 25 above.

44. See para. 26 above.

45. Section 40(1) of the Law of Property Act 1925 provides "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised."

Y asks X how long the offer is to remain open and X makes an oral promise that the offer will be kept open for 28 days. Within that period, and in breach of the promise, the offer is revoked. Y has, in the meantime, decided to accept the offer.

38. Should Y be without a remedy if he can prove (a) that the contract would have been enforceable if he had accepted the offer and (b) that but for its wrongful revocation he would have accepted it within the 28 days? The exact nature of the remedy for wrongful revocation will be considered later,[46] but our provisional view is that Y should not, in such a case, be left without a remedy at all. We have therefore reached the provisional conclusion that a promise to keep an offer open should not be required to be evidenced by writing as a condition of enforceability, even in relation to land. This does not mean that the contract made by the acceptance of the offer is necessarily enforceable: this may depend on the existence of writing, as in the example in the preceding paragraph.

(d) What classes of transaction should be affected?

39. Contracts concerning land or interests in land have special features, one of which - the requirement of writing as a condition of enforceability - has already been touched on. As a matter of practice the firm offer problem is less likely to arise in transactions concerning land than in other transactions because, until a formal contract has been prepared and signed, promises and offers are usually made "subject to contract", and we are not proposing that a firm offer should be binding unless the offer itself would result in a binding contract if accepted[47].

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46. Paras. 41-50 below.

47. See para. 10 above.

40. Should transactions concerning land or interests in land, or any other classes of transaction, be excluded from any change that may be made in the rule concerning firm offers? Our provisional answer is 'No' but we would welcome the opinions of others.

(e) What remedies should be available?

41. There are two ways in which firm offers might be made legally binding:

(a) By allowing the offeree to accept the offer notwithstanding the wrongful revocation.

(b) By allowing the offeree to sue the offeror for breach of his promise of non-revocation.

The first method means treating the wrongful revocation as a nullity; the second method means treating it as a cause of action.

42. Treating the wrongful revocation as a nullity. This is the less complicated of the two remedies. The wrongful revocation is ineffective, the offer is deemed to remain open and, provided that the offeree accepts it, the contract is made. Once the offer has been accepted the offeror may repent of his wrongful revocation and perform the contract. If he does not, the offeree has the remedies ordinarily available for breach of contract, including specific performance and an action for damages. Thus, on the facts posed in paragraph 37, above, Y would be entitled, throughout the 28 day period, to accept the property developer's offer even after revocation, and to proceed against him for specific performance of the contract thus made or for damages for breach of it[48].

48. Provided that the requirements of the Law of Property Act 1925, s. 40, were satisfied. See para. 38 above.

43. Such a remedy would allow the offeree to reserve his position after learning of the revocation and to defer acceptance until the last day of the period promised by the offeror. The practical implications of this may be seen from the following example:

> X makes a firm offer to sell materials to Y at £100 a ton for delivery one week after acceptance, the offer to remain open for six months. One month later X notifies Y that the offer is revoked. In such a situation Y would be entitled to ignore the revocation and, at any time before the end of the six-month period, to accept the offer. If X then failed to make delivery Y could claim as damages the difference between the contract price of £100 a ton and the available market price, if higher, one week after acceptance.[49]

44. If, in this example, the available market price of the materials were to rise from £100 a ton to £200 a ton between the date of the wrongful revocation and the date of the ultimate non-delivery, X would be liable for the difference and it would be no defence for him that Y could have mitigated his loss by accepting the offer at an earlier date.

45. It may be said that such a result would allow the offeree to exploit a rising market in a way that was unfair to the offeror. On the other hand, the offeror who anticipates a rise in the available market price may protect himself against the consequences of a late acceptance by laying in a stock of the materials; the rise in the market price within the six months would then benefit the offeror if the offeree failed to accept. The situation is broadly comparable to that

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49. Sale of Goods Act 1893, s. 51(3).

of the seller who has actually contracted to deliver materials in six months time but notifies the buyer, after one month, of his decision not to perform the contract. Under the present law, if the buyer accepts the seller's notification as an "anticipatory breach" of the contract, he must mitigate his loss from the moment he accepts the repudiation, and his damages will be assessed without regard to any rise in the available market price of the materials between acceptance of the breach and the contract date for delivery.[50] However, the buyer is not bound to accept the "anticipatory breach", and if he continues to insist on performance the damages will be assessed by reference to the market price of the goods at the date fixed for delivery.[51]

46. In the United States of America the right of the buyer to ignore an anticipatory breach and to await the contract date for delivery has been modified by Section 2-610 of the Uniform Commercial Code. This provides, in effect, that after an anticipatory breach the aggrieved part may not await performance for longer than "a commercially acceptable time". When we examine remedies for breach of contract, in a future working paper, we shall consider whether a provision of this kind might be introduced into English law and, if so, whether it might be framed so as to apply to the wrongful revocation of a firm offer. For the purpose of the present study, however, our provisional conclusion is that the offeree should be entitled to accept a firm offer at any time during the period for which the offeror has promised to keep it open, notwithstanding the latter's purported and wrongful revocation of it.

47. The remedy that we have entitled 'treating the wrongful revocation as a nullity' is only of value to the offeree if he accepts the offer. It may not occur to him to do so in cases

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50. Roth & Co. v. Taysen Townsend & Co. (1895) 1 Com. Cas. 240; Sudan Import & Export Co. (Khartoum) Ltd. v. Société Générale de Compensation [1958] 1 Lloyd's Rep. 310.

51. Tredegar Iron & Coal Co. Ltd. v. Hawthorn Bros. & Co. (1902) 18 T.L.R. 716.

in which it would be an empty formality. For example:

> C, a sub-contractor, sends a quotation to the main contractor, B, which he promises he will keep open for 14 days. Within that time he breaks his promise and tells B that the offer contained in the quotation is revoked. B may have been on the point of accepting but having regard to C's change of attitude it may seem pointless to say "Even though you say you will not do the work, nevertheless I am accepting your quotation", so he says "Very well, I'll see you in court", or words to that effect.

48. Even if the law were changed so that the revocation of a firm offer became a nullity, B would, on the facts supposed, still have no remedy because he failed to go through the formality of accepting the offer after revocation. Our provisional view is that this would be unjust and that a remedy in damages for wrongful revocation, analogous to damages for "anticipatory breach", should be provided in which the acceptance of the firm offer should not be an essential element. This would be the second of the two remedies described in paragraph 41, above.

49. Treating the wrongful revocation as a cause of action. Where the offeree fails to accept the firm offer after revocation, his cause of action, if he is to have one at all, must be founded on the offeror's breach of his promise that the offer would be kept open. The offeree would have to show that the offeror's wrongful revocation had been accepted by him as a repudiation of the offeror's promise. It follows that he would not after acceptance of the repuidation be entitled to accept the offer. To establish any recoverable loss for wrongful revocation, the offeree would have to satisfy the court that he would have accepted the offer had it not been revoked, and that the contract, if made, would have been enforceable.[52]

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52. Cf. the recent ruling of the Court of Appeal on a similar point in The Mihalis Angelos [1971] 1 Q.B. 164, 196A-B, 197A-B, 201D, 202H-203C and 209H-210B.

These conditions would seem to be satisfied in the example given in paragraph 47, above.

50. Supposing that the offeree were able to satisfy the requirements mentioned in the preceding paragraph, what damages should he be awarded? The answer would seem to be the same damages as if he had accepted the offer immediately after revocation and the offeror had failed thereafter to perform. This seems to be the measure of damage recoverable on the present law upon the wrongful repudiation by the offeror of an option granted to the offeree for a consideration,[53] and our provisional view is that an equivalent remedy should be provided for the offeree upon the wrongful revocation of a firm offer.

(f) Injurious reliance

51. As we mentioned earlier[54] there are decisions in some States in America to the effect that an offer may become irrevocable prior to acceptance if the offeree has acted to his detriment in the reasonable belief that the offer would not be revoked. When a draft of the Restatement (Second) of Contracts was formulated in 1965[55] a new section 89B (Firm Offer) was added which included the following provision:

> (2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forebearance is binding as an option contract to the extent necessary to avoid injustice.

53. Cottrill v. Steyning & Littlehampton Building Society [1966] 1 W.L.R. 753.

54. At para. 24 above.

55. Tentative Draft No. 2, 1965.

52. The doctrine of 'injurious reliance' as recognised by many States in America is closely related to the defence of 'promissory estoppel' which came to prominence in English law in the now famous High Trees case[56]. The ingredients of 'injurious reliance' and of 'promissory estoppel' are substantially the same but there is the important difference that by English law injurious reliance cannot by itself found a cause of action on a promise: it may be used as a 'shield' but not as a 'sword'.[57] In the case of Combe v. Combe[58] the distinction was justified by Denning L.J. in the following words:

> "The doctrine of consideration is too firmly fixed to be overthrown by a side wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge."

53. In later working papers we shall consider whether consideration should be retained as "a cardinal necessity of the formation of a contract" or whether some other principle, such as that of injurious reliance, might be taken as an alternative ground for holding promises to be binding. We shall in particular examine the recommendation of the Law Revision Committee[59]

> "That a promise which the promisor knows, or reasonably should know, will be relied on by the promisee shall be enforceable if the promisee has altered his position to his detriment in reliance on the promise."

54. A general reform of the doctrine of consideration might have the effect that some firm offers would bind the offeror in situations not covered by our present provisional proposals. For example, a remedy might be provided thereby

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56. Central London Property Trust Ltd. v. High Trees Ltd. [1947] K.B. 130.

57. Combe v. Combe [1951] 2 K.B. 215, 224; cf. the judgment of Templeman J. in In Re Wyvern Developments Ltd. [1974] 1 W.L.R. 1097, 1104H-1105A.

58. [1951] 2 K.B. 215, 220.

59. Sixth Interim Report (1937), Cmd. 5449, para. 50(8).

for the offeree who acted to his detriment in reliance on a firm offer which was not made in the course of a business or which did not provide a definite time for acceptance. These possibilities are not excluded by the terms of our present provisional recommendations but we can only make a proper assessment of their merits in the wider context of a reform of the whole law of consideration.

PART V - PROVISIONAL RECOMMENDATIONS

55. We have formulated five provisional recommendations on which comments are invited. They will of course only apply to firm offers that are not made under seal and for which no consideration has been given by the offeree:

(a) An offeror who has promised that he will not revoke his offer for a definite time should be bound by the terms of that promise for a period not exceeding six years, provided that the promise has been made 'in the course of a business' as that expression is explained in paragraph 31 above (paras. 30-34).

(b) Such a promise need not be evidenced in writing (paras. 35-38).

(c) It should be capable of applying to land or interests in land (paras. 39-40).

(d) A firm offer to which (a) applies should be capable of acceptance by the offeree during the time that the offeror is bound by his promise, notwithstanding his purported revocation of it (paras. 41-47).

(e) An offeror who breaks a promise by which he is bound under (a) should be liable in damages to the offeree (paras. 48-50).

56. We should, in addition, welcome information on business practices in relation to firm offers and comments on the relevance to those practices of our provisional recommendations.

APPENDIX

Extracts from the Sixth Interim Report of the Law Revision Committee (1937), Cmd. 5449.

The Rule that a Promise to keep an offer open for a definite period or time is not enforceable unless the Promisee gave some Consideration for keeping the offer open

38. It appears to us to be undesirable and contrary to business practice that a man who has been promised a period, either expressly defined or until the happening of a certain event, in which to decide whether to accept or to decline an offer cannot rely upon being able to accept it at any time within that period. If the offeror wants a consideration for keeping it open, he can stipulate for it and his offer is then usually called an "option". Merely because he does not so stipulate, he ought not to be allowed to revoke his offer with impunity. We consider that the fixing of a definite period should be regarded as evidence of his intention to make a binding promise to keep his offer open, and that his promise should be enforceable. If no period of time is fixed, we think it may be assumed that no contractual obligation was intended.

It may be noted here that according to the law of most foreign countries a promisor is bound by such a promise. It is particularly undesirable that on such a point the English law should accept a lower moral standard.

Proposal

50.(6) That an agreement to keep an offer open for a definite period of time or until the occurrence of some specified event shall not be unenforceable by reason of the absence of considerati

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